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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 359

ATLANTA FLOORING & INSULATION COMPANY, INC., CAPITOL FISH COMPANY, ALTERMAN BROTHERS, INC., PETITIONING CREDITORS, AND W. A. FULLER, RECEIVER FOR S. YOSHINUMA, BANKRUPT,

Petitioners,

vs.

OBERDORFER INSURANCE AGENCY AND MARVIN G. RUSSELL, RECEIVER.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Atlanta Flooring & Insulation Company, Inc., Capitol Fish Company, Alterman Brothers, Inc., Petitioning Creditors, and W. A. Fuller, Receiver for S. Yoshinuma, Bankrupt, respectfully pray that a writ of certiorari issue to review the final judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in above entitled cause (R. 75), sustaining an order of the District Court of the United States for the Northern District of Georgia.

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 71-75) has not yet been reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on June 25, 1943. An order was signed on July 14, 1943 by Honorable J. C. Hutcheson, Jr., United States Judge, staying the issuance of the mandate of the Circuit Court of Appeals for thirty days from the date of said order to enable appellants to apply for and to obtain the writ of certiorari herein sought. A further stay of the mandate until September 23, 1943, was granted by order passed August 30, 1943. The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code as amended.

Statutes Involved.

The United States Court Receiver filed his petition for a turn-over order under the following provisions of the Bankruptcy Act, to-wit:

Section 70 (a); U. S. C. A., Title 11, Sec. 110 (a):

> "The trustee of the estate of a bankrupt, and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy * * * to all his property * * * The title of the trustee shall not be affected by the prior possession of a receiver or other officer of any court."

The United States Court Receiver contends that he was entitled to a turn-over order under the foregoing statute, regardless of the amendment in the Chandler Act of 1938, reading as follows:

Section 2 (a) (21); U. S. C. A. Title 11, Sec. 11 (a) (21):

> "Require receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of

creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act or, where an arrangement or a plan under this Act has been confirmed and such property has not prior thereto been delivered to a receiver or trustee appointed under this Act, to deliver such property to the debtor or other person entitled to such property according to the provisions of the arrangement or plan, and in all such cases to account to the court for the disposition by them of the property of such bankrupt or debtor: Provided, however, that such delivery and accounting shall not be required, except in proceedings under Chapters X and XII of this Act, if the receiver or trustee was appointed, the assignment was made or the agent was authorized more than four months prior to the date of bankruptcy * * *"

The Georgia Statute under which the State Court proceeding was instituted is as follows:

Section 37-407: "Creditors' petitions may be filed at the instance of any creditor, the privilege being extended to all to appear and become parties in a reasonable time."

Summary Statement.

Fuller, the United States Court Receiver for S. Yoshinuma, Bankrupt, filed his petition in the District Court for a turn-over order directed to Marvin G. Russell, State Court Receiver appointed in proceedings instituted by Oberdorfer Insurance Agency in Fulton Superior Court against the said S. Yoshinuma. Russell was an equity receiver in a suit nominally in aid of the collection of a small judgment of $235.00 principal, besides interest and costs, totalling $276.50, but in fact and in effect an insolvency proceeding to conserve the assets of the defendant and divide them among creditors. The main purpose of the petition was to obtain the character of relief appropriate only in insolvency

proceedings and the enforcement of the small judgment lien was merely an incident in the case, and is not sufficient in law to save the proceeding from the nullifying effect of bankruptcy on pending State insolvency proceedings.

The equitable petition in the State Court alleged insolvency, asked the aid of equity; asked for the appointment of a receiver for the assets of defendant; asked that the receiver be directed to operate the business until it could be sold or liquidated and the assets marshalled and the creditors paid according to their rank, dignity and priority (R. 38, 39). The petitioner in the State Court did not ask that his lien be set up and established as a prior lien entitled to priority of payment and did not pray for any relief whatever in support of his alleged prior lien. The prayers of the petition (Pages 4 and 5 of the certified record) are the prayers usually incident to an insolvency proceeding seeking an equity receiver to conserve the assets and sell them and divide the proceeds among the creditors.

The matter was referred to the local Referee as Special Master, who decided against the turn-over order mainly, if not entirely, on the ground that, as more than four months had elapsed between the date the State Court Receiver was appointed and the date the bankruptcy proceedings were instituted, he was not authorized under the provisions of Section 2 (a) (21) of the Bankruptcy Act of 1938 to order the assets surrendered by the State Court Receiver to the Receiver of the United States Court. Exceptions were filed and on hearing the United States Judge sustained the report of the Special Master and denied the petition for a turn-over order. On appeal, the judgment of the District Court was affirmed by the Circuit Court of Appeals.

The Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals held (1) that the State Court proceedings were not insolvency proceedings but were

for the enforcement of a lien, and (2) that said proceedings, having been instituted more than four months before bankruptcy, would not be superseded by bankruptcy.

The court held, in effect, that the State Court proceedings were not insolvency proceedings to conserve the assets and divide them among the creditors. This holding, we submit, was an erroneous major premise and led to an erroneous conclusion. We further submit that the State Court proceedings provided for an administration of the debtor's assets and a winding up of his affairs similar to that provided in the national bankruptcy act and that such proceedings were in fact and effect insolvency proceedings and as such are null and void and must yield to bankruptcy whether commenced within four months or before.

The Circuit Court's decision was also based, as indicated by the authorities cited (R. 74) upon the legal proposition that state court insolvency proceedings are superseded by bankruptcy only where provision is made in the state laws for the discharge of the debtor.

We submit that, under the decisions hereinafter quoted, the existence of a discharge provision is not a condition precedent to the supercession of state insolvency proceedings by bankruptcy.

Questions Presented.

1. Whether a State Court insolvency proceeding, tantamount to bankrutpcy, is superseded by bankruptcy whether instituted within, or more than four months before bankruptcy.

2. Whether Section 2 (a) (21) of the Chandler Act of 1938 (U. S. C. A. Title 11, Sec. 11) quoted hereinbefore, changes the well established rule that such proceedings are superseded by bankruptcy, whether commenced within four months of the filing of the petition in bankruptcy or before.

3. Whether a state court insolvency proceeding is tantamount to bankruptcy when it provides for the conservation and administration of the debtor's assets and the winding up of his affairs similar to that provided by the National Bankruptcy Act and a division of the assets among his creditors,—whether or not the state law undertakes to provide for a discharge.

4. Whether a state court insolvency proceeding, tantamount to bankruptcy, is superseded by bankruptcy although nominally in aid of a judgment lien, if in fact and effect it provides for the conservation and administration of the debtor's assets and the winding up of his affairs similar to that provided by the National Bankruptcy Act and a division of the assets among his creditors.

Reasons for Granting the Writ.

1. The Circuit Court of Appeals has decided an important question of Federal law in a manner which conflicts with the applicable decisions of this Court and with the decisions of the Circuit Court of Appeals of other circuits.

The Circuit Court of Appeals we respectfully submit, erroneously held that the State court proceeding was not superseded by bankruptcy because, it decided, the proceeding was one in equity in aid of a judgment obtained more than four months prior to bankruptcy. However, we further submit, as a matter of law and of fact, it was an insolvency proceeding with all the allegations, indicia and prayers of such a proceeding, and the aid sought for the nominal judgment involved, a total of $276.50, was purely incidental to the main and real purpose of the bill. It was an insolvency proceeding "tantamount to bankruptcy" because it provided for an administration of the insolvent debtor's assets and a winding up of his affairs similar to that provided by the national act; and such proceedings

"are utterly null and void whether commenced within four months of the filing of a petition in bankruptcy or before". *Straton* vs. *New,* 283 U. S. 327; 75 Law Ed. 1098.

The decision of the Circuit Court of Appeals conflicts with the foregoing decision of the Supreme Court, as well as the decision, in re: *Bank of Andrews, et al.* vs. *Gudger,* 212 Fed. 49 (3) (CCA Fourth Circuit); the court in the latter case holding:

> "The pendency of a suit in a state court for the dissolution of a corporation, instituted by minority stockholders, and the possession of the corporate property by a receiver appointed therein, did not deprive creditors of their right to have the corporate assets brought into the bankruptcy court for administration there, where they duly asserted that right and had the corporation declared bankrupt as soon as it was known to be insolvent and had committed an act of bankruptcy, *though the receiver was appointed more than four months before the filing of the petition;* as stockholders could not acquire through the receiver or otherwise any lien or other claim not subordinate to the rights of creditors." (Emphasis ours).

And the Judges of the Circuit Court of Appeals for the Fifth Circuit are not in entire agreement on this point as will appear from the strong dissenting opinion of Judge Sibley in *Rutledge* vs. *Bristol,* 65 Fed. (2d) 986, where on page 988 he says:

> "Undoubtedly a court of bankruptcy has superior and exclusive jurisdiction of general insolvencies; and state proceedings of that sort, whether more than four months old or not, yield to the bankruptcy. *Straton* vs. *New,* 283 U. S. at page 327, 51 S. C. 465, 75 Law Ed. 1060; *Hooks* vs. *Aldredge,* (CCA), 145 Fed. 865; *Merry* vs. *Jones,* 119 Ga. 643."

Also, in re: *Moore, et al.,* 42 Fed. (2d) 475, Judge Sibley in the opinion on page 478 says with reference to the de-

mand of the United States Court Receiver for assets in the hands of the State Court:—"A refusal to surrender could be based only on a finding that the case in the State Court was one that should proceed notwithstanding bankruptcy. *Merry* vs. *Jones,* 119 Ga. 643; *Carling* vs. *Seymour Lumber Company* (CCA) 113 Fed. 483. The bill before the State Court dealt with a specific tract of land and with a special class of creditors' interest in it; but it was sought to require all creditors to intervene and to enjoin them from proceeding elsewhere, and also sought an administration of the entire estate of the Moores, alleging them to be insolvent. Its general character was a creditors' bill. *Merry* vs. *Jones, supra; McGahee* vs. *Crookshank,* 133 Ga. 652."

Moreover, the decision of the Circuit Court of Appeals, if based upon the authorities cited in it, holds that, for a State court insolvency proceeding to be superseded by bankruptcy, it must be based upon a State statute which attempts to give an insolvent debtor a discharge. This we submit is erroneous. If all the other elements of an insolvency proceeding are present, that is,—the petition and prayers for the appointment of a receiver for an insolvent debtor, the conservation and administration of the debtor's assets, the sale of said assets and the winding up of his affairs similar to that provided in the national bankruptcy act, and the division of his assets among his creditors;—it is not necessary that the proceedings in the State court be based upon a statute that undertakes to provide for a discharge.

No such condition precedent is stated by the Supreme Court of the United States in declaring when State insolvency proceedings are superseded,—in re: *Straton* vs. *New,* 283 U. S. 327, 75 Law. Ed. 1098 (*supra*). And in re: *Duparquet Hout and Moncuse Company* vs. *Evans,* 297 U. S. 216, 80 Law. Ed. 591, Mr. Justice Cardozo, in the opinion on page 595 says:—

"It is common learning that an equity receiver in suits to conserve the assets or divide them among creditors must yield to a trustee in bankruptcy. *Gross* v. *Irving Trust Company*, 289 U. S. 342, 77 L. Ed. 1243, 53 S. Ct. 605, 90 A. L. R. 1215, 22 Am. Bankr. Rept. (N. S.) 661."

2. The Circuit Court of Appeals has decided an important question of local law in a manner which conflicts with the applicable decisions of the Supreme Court of Georgia and of this Court.

The Supreme Court of Georgia in *Merry, Trustee,* vs. *Jones, Receiver,* 119 Ga. 643, says:—

"1. Where the main purpose of the suit is to foreclose a mortgage, and there is also an incidental prayer for relief appropriate to insolvency proceedings, a receiver's possession thereunder will not be affected by a subsequent adjudication in bankruptcy.

2. *But where the main purpose of the petition is to obtain relief appropriate only in insolvency proceedings, the fact that a mortgage may be foreclosed as an incident therein will not save the case from the nullifying effect of bankruptcy on pending State insolvency proceedings.* (Emphasis ours).

3. In the present case, the mortgage does not appear in the record, the pleadings do not describe the mortgaged property, and there is no prayer for a foreclosure. The prayers, to marshal the assets, to enjoin other creditors from proceeding except in such suit, and to appoint a receiver to take charge of all the property of the defendant, are adjusted to insolvency proceedings, and not to the foreclosure of a mortgage."

The prayers of the petitioner in the State court proceedings in the case under review follow very closely the prayers in the *Merry* case in that the prayers sought an administration of the insolvent debtor's assets, the appointment of a receiver to conserve the assets, the winding up of the

debtor's affairs, the enjoining of creditors from proceeding elsewhere, and the administration and sale of the assets and division of the proceeds among the creditors. As stated pointedly by Judge Sibley, these prayers were adjusted to insolvency proceedings and not to the enforcement of the small judgment lien nominally the basis of the suit.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted.

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